IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAM KEO	:	**CIVIL ACTION**
	:	
v.	:	
	:	
SUPERINTENDENT EDWARD KLEM, et al.	:	**No. 99-6062**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **August 30, 2000**

Petitioner Dam Keo ("Keo") filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254. By order of January 20, 2000, the court referred the petition to United States Magistrate Judge M. Faith Angell ("Judge Angell") for a Report and Recommendation. Judge Angell recommended dismissal of the petition; Keo filed a written Objection and Appeal of the Magistrate's Report and Recommendation. After de novo consideration of petitioner's objections, the Report and Recommendation will be approved and the petition will be denied.

BACKGROUND

Keo was convicted in the Court of Common Pleas of Philadelphia County of murder in the second degree, robbery, burglary, and conspiracy.[1] Keo was sentenced to life imprisonment for the murder conviction, and five to ten years for the conspiracy conviction, to run concurrently. No additional sentence was imposed for the robbery and burglary convictions.

[1]The facts set forth in this procedural history are adopted from Judge Angell's Report and Recommendation.

On appeal to the Pennsylvania Superior Court, petitioner claimed:

> 1. The prosecution's improper request to the jury during closing arguments not to compromise their verdict because the defendant was offered and declined to plead guilty to third degree murder resulted in the denial of a fair trial, despite a curative instruction by the judge;
>
> 2. The prosecution improperly argued facts not in evidence during closing arguments;
>
> 3. The trial court erred in not instructing the jury on the law of abandonment and withdrawal;
>
> 4. The trial court erred in not instructing the jury on the law of mere presence; and
>
> 5. The evidence was insufficient to support conviction on all counts.

On December 30, 1998, the Pennsylvania Superior Court affirmed Keo's conviction. Keo subsequently filed a petition for allocatur with the Pennsylvania Supreme Court. Allocatur was denied on June 21, 1999. Keo did not seek collateral review under Pennsylvania's Post-Conviction Relief Act ("PCRA").

Keo filed his pro se petition for a writ of federal habeas corpus on December 1, 1999. Keo stated:

> 1. The prosecution's improper request to the jury during closing arguments not to compromise their verdict because the defendant was offered and declined to plead guilty to third degree murder resulted in the denial of a fair trial, despite a curative instruction by the judge;
>
> 2. The evidence was insufficient to sustain a conviction on either a conspiracy or accomplice liability theory;
>
> 3. The evidence was sufficient to show that Keo had withdrawn from the conspiracy; and

4. Trial court erred in not instructing the jury on the law of mere presence and withdrawal.

Judge Angell filed her Report and Recommendation on June 28, 2000. Petitioner had until July 17, 2000 to file written objections. Petitioner handed his objections to prison officials to mail on July 20, 2000.

DISCUSSION

I. Timeliness of Objections

Written objections to a magistrate judge's Report and Recommendation must be filed no later than ten days from the date of service. See 28 U.S.C. § 636(b)(1)(C). Service of the Report and Recommendation is complete upon mailing. See Fed. R. Civ. P. 5(b). The time for filing objections does not include Saturdays, Sundays, and legal holidays. See Fed. R. Cir. P. 6(a). If service is performed by mail, the time for filing objections is also lengthened by three days. See Fed. R. Civ. P. 6(e). The 10-day period for filing objections is not jurisdictional, but more akin to a statute of limitations and subject to equitable considerations. See Grandison v. Moore, 786 F.2d 146, 148 (3d Cir. 1986). Equitable considerations are particularly appropriate in a prison situation because the litigant has no control over when prison officials will deliver the mail. See id. at 149.

The petitioner's objections were due on July 17, 2000, but the objections were filed on July 20, 2000 at the earliest. See

Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998)(pro se prisoner litigant's documents deemed filed when handed to prison officials to mail). Judge Angell's Report and Recommendation may or may not have been delayed in the prison mail system, so the court will consider petitioner's objections and conduct a de novo review of Judge Angell's Report and Recommendation.

II. Exhaustion

All claims that a petitioner presents to a federal court in an attempt to obtain a writ of habeas corpus must have been exhausted at the state level. See 28 U.S.C. § 2254(b)(1)(A). Claims are exhausted when they have been fairly presented once at every level of the complete appeals process of the state court system. See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The petitioner does not have to seek state collateral relief. See Castille v. Peoples, 489 U.S. 346, 350 (1989) (it is not necessary to seek collateral review to exhaust a claim when the state courts have ruled on the claim); Brown v. Allen, 344 U.S. 443, 447 (1953); see also O'Sullivan, 526 U.S. at 844 (citing Brown, 344 U.S. at 447). Keo fairly presented his claims at each level of the Pennsylvania appeals process; Keo's claims are exhausted.

III. Merits

In order for a writ of habeas corpus to be granted, the state court decision must either be: 1) contrary to established

U.S. Supreme Court precedent such that the precedent requires the contrary outcome or rest on an objectively unreasonable application of U.S. Supreme Court precedent; or 2) an unreasonable determination of the facts based on the evidence in the state court. See 28 U.S.C. § 2254(d); Williams v. Taylor, __ U.S. __, 120 S.Ct. 1495, 1519-1521 (2000); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 887-91 (3d Cir. 1999). Factual findings of a state court are presumed to be correct, and the burden is on the petitioner to overcome this presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

A. Prosecutorial Misconduct in Closing Arguments

A prosecutor's improper comments in closing argument violate due process if, in light of the entire proceedings, the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. De Christoforo, 416 U.S. 637, 643 (1974); see also Darden v. Wainwright, 477 U.S. 168, 181 (1986)(quoting Donnelly, 416 U.S. at 643).

The prosecutor asked the jury not to compromise their verdict because Keo was offered and rejected a plea of third degree murder. Petitioner claims that this statement so biased the proceedings that a new trial is required. The prosecutor's statement was made in response to criticism from defense counsel about the plea bargains offered to other defendants but not to Keo.

The trial court gave the jury a curative instruction that emphasized the importance of the right to jury trial and instructed the jurors to disregard any information regarding any defendant's acceptance or rejection of a plea bargain.[2] The trial court determined that in light of the proceedings as a whole, a curative instruction was sufficient to alleviate any prejudice and a mistrial was not warranted. The Pennsylvania Superior Court concluded that on the whole, including the curative instruction, the proceedings were not so infected with bias that a new trial was warranted.

The prosecutor's statement "was but one moment in an extended trial and was followed by specific disapproving instructions." Donnelly, 416 U.S. at 645. The state court decisions were neither contrary to nor an unreasonable

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[2]The curative instruction read:

> All persons charged with crimes of this nature are entitled to a trial by a jury of his peers. This is one of the most important and fundamental rights of any person charged with a crime according to our Constitution. You must not infer anything adverse to any of the defendants in this case for electing this Constitutionally guaranteed right to a trial by jury. There was a reference in the argument of counsel for the Commonwealth regarding the fact that some persons pleaded guilty in this case and others did not. To the limited extent that the Commonwealth is allowed to respond to the arguments of [defense counsel] on its differing pleas and agreements of the other witnesses, you may consider that in you deliberations, however, it cannot be considered in any other way adverse to any defendant whether he tendered or was offered or not offered or rejected any proposed agreement. Trans. 6/5/96, pp. 131-132.

application of U.S. Supreme Court precedent; the decisions were not based on an unreasonable application of the facts.

B. Sufficiency of the Evidence

Evidence is insufficient "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979); see also Evans v. Court of Common Pleas, Delaware County, 959 F.2d 1227, 1233 (3d Cir. 1992) (test for sufficiency of the evidence in Pennsylvania is the same as in the federal courts). It is necessary to "look to the evidence the state considers adequate to meet the elements of a crime governed by state law." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir. 1997).

The trial and appeals court properly enunciated the elements of Pennsylvania law and applied the law to the relevant evidence.[3] All of the elements of conspiracy, second degree murder, and accomplice liability were met, but the elements for withdrawal were not met. The state courts applied Jackson reasonably. The finding of sufficient evidence was not contrary to or an unreasonable application of U.S. Supreme Court precedent; it was also not based on an unreasonable determination

[3]The trial court properly followed the statutory standards for conspiracy in 18 Pa. Cons. Stat. § 903(a), second degree murder in 18 Pa. Cons. Stat. § 2502, and accomplice liability and withdrawal in 18 Pa. Cons. Stat. § 306.

of fact.

C. Jury Instruction

A defendant is entitled to a jury instruction on a recognized defense if there is sufficient evidence for a reasonable jury to find in the defendant's favor. See Mathews v. United States, 485 U.S. 58, 63 (1988)(citing Stevenson v. United States, 162 U.S. 313 (1896)). Pennsylvania also applies this standard. See Commonwealth v. Borgella, 611 A.2d 699, 700 (Pa. 1992)(citing Mathews, 485 U.S. at 63).

The state trial court found that the proposed instructions on withdrawal and mere presence were inappropriate because by his own admission the petitioner had participated in the entry and robbery and left the premises only moments before the murder while the robbery was ongoing. The denial of a jury instruction on mere presence and withdrawal was neither contrary to nor an unreasonable application of U.S. Supreme Court precedent; it was also not based on an unreasonable determination of the facts.

CONCLUSION

Keo's habeas corpus claims are meritless and provide no basis for relief. The state court correctly and reasonably applied relevant U.S. Supreme Court precedent. Keo's petition for a writ of habeas corpus will be denied.

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ORDER

AND NOW this 30th day of August, 2000, upon consideration of petitioner's Objection and Appeal of Magistrate's Report and Recommendation, and in accordance with the attached memorandum,

it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**.

2. Petitioner's Objection and Appeal of Magistrate's Report and Recommendation is **OVERRULED**.

3. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED**.

4. There is no basis for the issuance of a certificate of appealability.

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Norma L. Shapiro, S.J.